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No. 89-704

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Whether sovereign immunity may serve as a bar to an action under 42 U.S.C. § 1983 for money damages brought in a state court against the State and a state official sued in his official capacity?

2. Whether a State or its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983?

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OPINIONS BELOW

The opinion of the Connecticut Superior Court is not reported. It is reprinted in the Appendix hereto at 1A.[1] The opinion of the Connecticut Supreme Court is reported at 212 Conn. 415, 562 A.2d 1080 (1989) and is reprinted in J.S. App. 1A–13A.

JURISDICTION

The decision of the Connecticut Supreme Court was entered on August 1, 1989. The Petitioner claims that this Court has appellate jurisdiction under 28 U.S.C. § 1257(2). Section 1257 has been amended, however, to eliminate "appeals" from the highest state courts to this Court. Under the new § 1257(a) which became effective on June 27, 1988, final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by this Court only by writ of certiorari. Counsel for the Respondent has been instructed by the Clerk's office that the Jurisdictional Statement filed in this case will be treated as though it were a Petition for Writ of Certiorari.

STATUTORY PROVISIONS

The underlying action was brought pursuant to 42 U.S.C. §§ 1983 and 1988 and these statutory provisions are set forth in footnotes 2 and 4 of the opinion of the Connecticut Supreme Court which have been reprinted at J.S. App. 2A–3A. Sections 4-160, 4-165 and 4-165b of the Connecticut General Statutes are set forth at page 4 of Petitioner's Jurisdictional Statement.

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[1] References to the Appendix attached hereto will be noted by the sign "A". The sign "J.S. App." refers to the appendix filed with the Jurisdictional Statement.

STATEMENT OF THE CASE

By complaint dated June 9, 1987, Petitioner brought an action in the Connecticut Superior Court seeking money damages pursuant to 42 U.S.C. §§ 1983 and 1988. Named as defendants in this action were the City of New Haven, the State of Connecticut and "Raymond M. Lopes, in his official capacity as Commissioner of Correction of the State of Connecticut." (J.S. App. 15A-16A). At no time did the Petitioner seek to include as defendants any state officials in their individual or personal capacities. Indeed, Petitioner acknowledges at page ii of his Jurisdictional Statement that the action abated as to Commissioner Raymond Lopes upon his departure from office, and that no substitution was made of his successor in office. Since the Petitioner withdrew the action as to the City of New Haven, the Respondent State of Connecticut remains as the only defendant in this case.

On August 10, 1987, the State of Connecticut and Commissioner Raymond Lopes moved to dismiss the action on the grounds that (1) the action for money damages against the State and the Commissioner of Correction in his official capacity was barred by the doctrine of sovereign immunity, and (2) the State is not a "person" within the meaning of 42 U.S.C. § 1983. (J.S. App. 19A.) In its Memorandum of Decision dated March 14, 1988, the trial court granted the motion to dismiss concluding that the action was barred by sovereign immunity and that the State is not a "person" under 42 U.S.C. § 1983. (A. 2A-3A.) In his appeal to the Connecticut Supreme Court, the Petitioner did not challenge the trial court's ruling that the State is not a person within the meaning of 42 U.S.C. § 1983. *See, Krozser v. New Haven, supra,* 212 Conn. at 417 n.5; J.S. App. 3A-4A. Instead, he launched a three-pronged attack on the trial court's ruling regarding sovereign immunity. He first argued that under *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557 (1982), he should not be required to obtain the authorization of the Connecticut Claims Commissioner as a prerequisite to filing his § 1983 suit for money damages against the State in the

State Superior Court. He next urged that the trial court should itself have authorized suit against the State by simply borrowing Conn. Gen. Stat. § 4-160(a) which permits the Claims Commissioner to waive the State's sovereign immunity. The Petitioner maintained that such a result could be accomplished pursuant to the "borrowing" provisions of 42 U.S.C. § 1988. Finally, he claimed that the requirement that he seek permission to sue the State for money damages poses an impermissible burden on the exercise of his decedent's federal civil rights under 42 U.S.C. § 1983. (J.S. App. 5A–6A.)

The Supreme Court of Connecticut rejected the Petitioner's challenges to the legislative scheme which authorizes the Claims Commissioner to waive the State's sovereign immunity and grant permission to sue the State for money damages. Since the Petitioner had not received permission to sue the State, the Court ruled that this action for money damages against the State of Connecticut and the Commissioner of Correction in his official capacity was barred by the doctrine of sovereign immunity. Having based its ruling on sovereign immunity, the Court declined to address the issue of whether the State was a person under 42 U.S.C. § 1983. The Court noted, however, that this Court in *Will v. Michigan Department of State Police*, ____ U.S. ____, 109 S.C. 2304 (1989) had recently ruled that neither a state nor state officials acting in their official capacities are "persons" within the meaning of § 1983. *Krozser v. New Haven, supra*, 212 Conn. at 417–18 n.5; J.S. App. 3A–4A.

REASONS FOR DENIAL OF THE PETITION

1. The Connecticut Supreme Court's Decision Regarding The Availability Of Sovereign Immunity As A Bar To A Section 1983 Action Is Not In Conflict With The Decisions Of Any Other State Court Of Last Resort, Any Federal Court Of Appeals, Or Of This Court.

The Connecticut Supreme Court upheld the dismissal of this § 1983 action for money damages on the grounds that the action against the State and the Commissioner of Correction in his official capacity was barred because of the State's sovereign immunity from suits seeking monetary damages. (J.S. App. 2A.) It is well established that § 1983 does not abrogate the common law doctrine of sovereign immunity. *Will v. Michigan Department of State Police, supra,* 109 S.Ct. at 2310 ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent."); *Owen v. City of Independence,* 445 U.S. 622, 638, 100 S.Ct. 1398, 1409 (1980) (Section 1983 construed to incorporate immunities well established at common law at the time the statute was enacted.); *Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145 (1979) (Congress did not intend "by the general language of § 1983 to override the traditional sovereign immunity of the States.").

Other state courts of last resort which have considered this issue have permitted sovereign immunity to be raised as a bar to § 1983 claims seeking monetary awards from the State, its agencies and officials. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue,* 104 N.M. 302, 720 P.2d 1243, 1250 (N.M. App. 1986); *Karchefske v. Dept. of Mental Health,* 143 Mich. 1, 371 N.W.2d 876, 881 (Mich. App. 1985); *Kristensen v. Strinden,* 343 N.W.2d 67, 75–77 (N.D. 1983); *Thiboutot v. State,* 405 A.2d 230, 237 (Me. 1979), *aff'd sub nom Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502 (1980). Thus, the decision of the Connecticut Supreme Court is consistent with applicable federal and state case law which have construed

§ 1983 as incorporating the traditional sovereign immunity of the states.

In his Jurisdictional Statement, the Petitioner refers to Conn. Gen. Stat. § 4-165 which provides that a person having a complaint for damage or injury, not wanton, reckless or malicious, caused by a state officer or employee in the discharge of his duties or within the scope of his employment, shall present it to the Claims Commissioner as a claim against the State. He argues that by virtue of this statute, any suit for money damages against a state official under § 1983, whether in the official's individual or official capacity, would be deemed barred by the doctrine of sovereign immunity. The Petitioner, however, has not sued any state officials in their individual or personal capacity. Had he chosen to bring this § 1983 action against state officials in their individual capacities and had such an action been dismissed based on the provisions of Conn. Gen. Stat. § 4-165, then he might have had a valid claim that the conduct of a person acting under color of state law which is wrongful under § 1983 cannot be immunized by state law. *See, Martinez v. California*, 444 U.S. 277, 284, n.8, 100 S.Ct. 553, 558, n.8 (1980). Since this is not an individual-capacity suit, however, the issue of whether and to what extent a state may confer upon an individual immunity from suit under § 1983 has no relevance to the rulings of the Connecticut Supreme Court in this case which the Petitioner seeks to have reviewed.

2. Petitioner's Challenge To Connecticut's Legislative Scheme For Authorizing Claims For Money Damages Against The State Raises No Significant Issues Of Federal Law.

Although the issue of whether Congress intended in enacting § 1983 to abrogate the State's sovereign immunity is a question of federal law, once it has been determined that the federal law itself has not abrogated the State's sovereign immunity, the question of whether and to what extent a state

has waived its sovereign immunity to suit in state court is a matter of state legislative intent on which the highest court of the state speaks with finality. *See, e.g., Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 3146-47 (1985); *Mullany v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 1886 (1975); *Della Grotta v. State of R.I.,* 781 F.2d 343, 347 (1st Cir. 1986). In this case, the Petitioner focuses his attack on the process established by Connecticut's legislature for waiving the State's sovereign immunity.

The Petitioner first argues that under *Patsy v. Florida Board of Regents, supra,* he should not be required to pursue what he denotes as his "administrative remedy" of seeking the authorization of the Claims Commissioner as a prerequisite to bringing an action in the Superior Court for money damages against the State. The Connecticut Supreme Court has consistently held, however, that the Superior Court has no jurisdiction to hear any monetary claims against the State which are cognizable by the Claims Commissioner unless and until the Claims Commissioner waives the State's sovereign immunity and consents to suit. *Krozser v. New Haven, supra,* 212 Conn. at 421-424, 562 A.2d at 1083-85, J.S. App. 7A-10A; *Doe v. Heintz,* 204 Conn. 17, 35-36, 526 A.2d 1318, 1328 (Conn. 1987). The procedure established for presenting a claim to the Claims Commissioner is not merely an alternative administrative remedy adopted to foster a policy of judicial restraint in deferring to alternative administrative remedies. It is the only means by which a claimant can seek permission to sue the State for money damages on claims cognizable by the Claims Commissioner. Indeed, in *Patsy v. Florida Board of Regents, supra,* 457 U.S. at 515-16 n.19, this Court noted that exhaustion and waiver of the State's immunity were two separate issues.

Petitioner next suggests that under the borrowing provisions of 42 U.S.C. § 1988, the Superior Court should have borrowed Conn. Gen. Stat. § 4-160(a) and itself determined whether or not to waive the State's immunity and authorize suit. Since Congress in enacting § 1983 refused to override

the State's Eleventh Amendment immunity or traditional sovereign immunity, it cannot be argued that this refusal constitutes a deficiency in the federal civil rights scheme. Waiver of sovereign immunity is a matter of substantive state law. Section 1988 cannot be used in an attempt to create a cause of action where none exists, "[a]nd § 1988, in light of the express limitations contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." *Moor v. County of Alameda*, 411 U.S. 693, 710, 93 S.Ct. 1785, 1796 (1973).

Finally, Petitioner argues that requiring him to pursue his claim for money damages against the State with the Claims Commissioner imposes an impermissible burden upon the assertion of his decedent's federal civil rights under § 1983. The Petitioner cites *Felder v. Casey*, ____ U.S. ____, 108 S.Ct. 2302 (1988) in support of his argument. *Felder* involved a suit under § 1983 against a municipality and its police officers. While municipalities may be sued directly under § 1983 for money damages in the federal courts, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978), the Eleventh Amendment bars such claims in federal courts against states or state officials in their official capacity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 908 (1984); *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The notice-of-claim statute in *Felder* was struck down because its enforcement would have produced "different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court. . . ." *Id.*, at 2307. In the present case, the Petitioner's claim would be barred in both the state and federal courts. Therefore, the state statutes which establish the authority of the Claims Commissioner to permit money damage suits against the State do not in any way discriminate against the assertion of Petitioner's decedent's federal civil rights under § 1983.

3. The Questions Which Petitioner Seeks To Have Reviewed Regarding Sovereign Immunity And Waiver Of Sovereign Immunity Are Irrelevant In View Of This Court's Decision In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304.

In *Will v. Michigan Department of State Police, supra*, 109 S.Ct. at 2312, this Court held "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Because a state and its officials acting in their official capacities are not persons under § 1983 and are thus not within the group of defendants against whom a § 1983 action for money damages may be brought, the issues raised by the Petitioner regarding the procedures established by Connecticut for the waiver of the State's sovereign immunity are irrelevant. States and state officials acting in their official capacity are not liable for money damages under § 1983 regardless of whether the State has waived its sovereign immunity from suit.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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November 23, 1989

No. 89-704

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

NO. 260094	:	SUPERIOR COURT
JACOB J. KROZSER, ADM.	:	JUDICIAL DISTRICT
v.	:	OF NEW HAVEN
THE CITY OF NEW HAVEN, ET AL.	:	MARCH 14, 1988

MEMORANDUM OF DECISION

The complaint in the instant action which is brought under § 1983 and § 1988 of Title 42 U.S.C. alleges in substance that the plaintiff's decedent who was an alcoholic and then suffering from delirium tremens died while in custody of the defendants as a result of inadequate medical care in violation of his constitutional rights.

Suit has been instituted against the City of New Haven, The State of Connecticut and Raymond Lopes in his official capacity as Commissioner of Corrections.

The defendants, State of Connecticut and Raymond Lopes in his official capacity as Commissioner of Corrections, have filed a Motion to Dismiss this action on the grounds that the instant action is barred by the doctrine of sovereign immunity and that the state is not a person within the meaning of 42 U.S.C. § 1983.

The motion filed by said defendants relies entirely upon the allegations of the complaint and does not seek to introduce any additional facts outside of the record. Section 143 Conn. Practice Book. The defense of sovereign immunity may be raised in a Motion To Dismiss an action against the state. *Duguay v. Hopkins,* 191 Conn. 222, 227; *Fetterman v. University of Connecticut,* 192 Conn. 539, 550.

"The state is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity in

certain prescribed cases." *Duguay v. Hopkins,* supra p. 227; *Fetterman v. University of Connecticut,* supra, 550; *Sentner v. Board of Trustees,* 184 Conn. 339, 442; *Horton v. Meskill,* 172 Conn. 615, 623. Because the state can act only through its officers and agents, a suit against a state officer such as the defendant Lopes herein concerning a matter in which the officer represents the state is in effect, against the state. *Sentner v. Board of Trustees,* supra p. 342. Thus a suit against an officer of a state in his official capacity where the state is the real party against whom relief is sought and where judgment for the plaintiff, although nominally against the officer as an individual, would operate to control the action of the state or subject it to liability is barred. *Fetterman v. University of Connecticut,* supra p. 552.

The enactment of § 1983 of Title 42 U.S.C. did not "override the traditional sovereign immunity of the states." *Fetterman v. University of Connecticut,* supra p. 552 quoting from the court's opinion in *Quern v. Jordon,* 440 U.S. 332, 341.

Hence sovereign immunity is still an effective defense to a suit under § 1983, Title 42 U.S.C. against the state itself and an officer of the state in his official capacity seeking money damages.

The plaintiff has not alleged that the state has consented to such a suit.

The claim under 42 U.S.C. § 1988 must fail because the § 1983 action does not exist as a matter of law. 42 U.S.C. § 1988 provides in substance that in any action to enforce a provision of § 1983, supra the court may allow the *prevailing* party a reasonable attorney's fee (emphasis added). *Kentucky v. Graham,* 105 S.Ct. 3099, 3105.

The defendants have also moved to dismiss on the grounds that the State is not a "person" within the meaning of 42 U.S.C. § 1983. In *Pavlak v. Duffy,* 48 F.R.D. 396 (1969) the United States District Court for the District of Connect-

icut concluded that "[a] suit under 42 U.S.C. § 1983 must be against a person. A state is not a person for the purposes of this statute. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)." For other decisions which declare that the state is not a person within the meaning of § 1983, *see State of Connecticut v. Mobilia, Inc.*, 65134, J.D. of New London at Norwich, Memorandum of Decision on Motion to Dismiss, October 28, 1983, Mack, J., *Williford v. California*, 352 F.2d 474 (1965); *Lawson v. Rockingham County*, 359 F. Supp. 171 (1973); *Hahn v. Ingram*, 362 F. Supp. 982 (1973); *Needleman v. Bohlen*, 386 F. Supp. 741 (1974); *County of Lancaster v. Philadelphia Electric Co.*, 386 F. Supp. 934 (1975); *Florida Businessmen for Free Enterprise v. Florida*, 499 F. Sup. 346, aff'd 673 F.2d 1213 (1980).

The Motion to Dismiss filed by the defendants State of Connecticut and Raymond M. Lopes as Commissioner of Corrections was date stamped by the Clerk's office, August 12, 1987.

Section 143 Conn. Practice Book provides that if an adverse party objects to this motion he shall, at least five days before the motion is to be considered on the short calendar file a memorandum of law and that a failure to file such memorandum in a timely fashion shall be deemed by the court as consent to the granting of the motion. The filing of such a memorandum is mandatory. *Burton v. Planning Commission*, 13 Conn. App. 400; *Czaja v. Sallack*, 13 Conn. App. 411; *Siefert v. Barrett*, 13 Conn. App. 410. The plaintiff did not discuss the equal protection claim in his memorandum of law date stamped December 2, 1987 and hence the court is disinclined to consider same except to note that where the classifications such as those referred to herein do not trammel the fundamental rights or interests nor burden an inherently suspect class equal protection analysis requires only that the classification be rationally related to a legitimate state interest. *Giannattasio v. Stamford Youth Hockey Association, Inc.* 621 F. Supp. 825, 829. The gravamen of the plaintiff's claim is that the decedent's constitutional rights under the equal protection

clause of the Federal and State Constitutions have been violated because the state waived sovereign immunity in actions against the Commissioner of Health Services or the Commissioner of Mental Retardation. The burden is on the complaining party to establish that the statutory distinction is without a rational basis. *Miller v. Hefferman*, 173 Conn. 506, 509. The classifications complained of meet the standard noted above.

Motion to Dismiss is granted.

Motion For Stay is denied.

/s/ Flanagan
John C. Flanagan, Judge